Nasser Ali Azayez Maktoum Al Sheraifi & Ors v Affinity Heights Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-368–09 OF 2014
ABU BAKAR JAIS JC
23 SEPTEMBER 2015

Legal Profession — Conflict of interest — Professional conduct — Recusal — Terms of consent order in earlier suit disputed — Whether fresh court action could be initiated — Intentions of parties in drafting would have to be determined by court — Whether counsel who would most likely be called as witness should recuse himself — Whether counsel would be placed in embarrassing situation if recusal exercise is not carried out

The present application ('encl 37') called for the determination of the court in the application by the plaintiffs to recuse Messrs Mohd Imtiaz Choong & Partners ('the firm') and a partner of the firm, Mr Choong, from representing the second, third and fourth defendants ('the defendants') in this suit. The application was necessitated because of the consent order recorded by the parties in an earlier suit on minority oppression. The terms of the consent order was disputed despite recorded in court. For the consent order, the defendants were represented by the firm. Mr Choong of the firm was the person who appeared in the making of the consent order and had negotiated, drafted, amended and finalised the terms and minutes of the consent order. Paragraph 11 of the consent order was disputed. The issue that arose was whether fresh court action could be initiated by the parties to the consent order. To resolve that issue, the intentions of the parties in drafting and inserting para 11 into the consent order would have to be determined by the court and this was where the dispute laid; whether Mr Choong acting under the name also of the firm, could still act as counsel for the defendants now since Mr Choong would most likely be called as a witness to the hearing in determining the interpretation to para 11 of the consent order.

Held, allowing the application with costs:

(1) The present application arose because of the different interpretations given by the plaintiffs and defendants on the terms of para 11 of the consent order recorded by the parties. In view of the different interpretations, there was a need for the court to determine what ought to be the correct interpretation. The court will have to decide whether fresh action should be allowed or not in interpreting the said para 11. In deciding the same, it was without doubt that evidence leading up to the

recording of the consent order will have to be taken into account. Obviously the evidence of counsel of both parties that negotiated the terms of the consent order must be taken into account. There was a great likelihood that the counsel will need to testify in court as to their versions why such term as in para 11 of the consent order was recorded in court (see paras 15–16).

(2) The great possibility of counsel representing the defendants in the recording of the consent order having to testify with regard to the scope of para 11 of the consent order meant that the said counsel should not be allowed to act for the defendants. They were potential witnesses in court. Their testimony on whether the plaintiffs could institute fresh court action under para 11 of the consent order would amount to a direct conflict of interest for counsel to remain representing the defendants. Counsel would be put in an embarrassing position when asked in court regarding the interpretation of para 11 of the consent order especially as they were already extensively involved in the drafting, negotiation and finalising of the same. Therefore Mr Choong and the firm should not remain as counsel and party that act as the defendants' representatives in court (see paras 17–19).

[Bahasa Malaysia summary

Permohonan ini ('lampiran 37') memohon untuk penentuan mahkamah dalam permohonan oleh plaintif-plaintif untuk Tetuan Mohd Imtiaz Choong & Partners ('firma') dan rakan kongsi firma, En Choong, menarik diri daripada mewakili defendan kedua, ketiga dan keempat ('defendan-defendan') dalam tindakan ini. Permohonan ini diperlukan kerana perintah izin direkodkan oleh pihak-pihak dalam tindakan terdahulu atas penindasan minoriti. Terma-terma perintah izin dipertikaikan walaupun direkodkan dalam mahkamah. Untuk perintah izin, defendan-defendan diwakili oleh firma. En Choong daripada firma adalah orang yang hadir dalam membuat perintah izin dan telah berunding, mendraf, meminda dan menyelesaikan terma-terma dan minit-minit perintah izin. Perenggan 11 perintah izin dipertikaikan. Isu yang berbangkit adalah sama ada tindakan mahkamah baru boleh dimulakan oleh pihak-pihak kepada perintah izin. Untuk menyelesaikan isu tersebut, niat pihak-pihak dalam mendraf dan memasukkan perenggan 11 ke dalam perintah izin akan ditentukan oleh mahkamah dan ini adalah di mana terletaknya pertikaian; sama ada En Choong bertindak di bawah nama firma yang sama, masih boleh sekarang bertindak sebagai peguam untuk defendan-defendan memandangkan En Choong berkemungkinan akan dipanggil sebagai saksi kepada pendengaran dalam menentukan tafsiran kepada perenggan 11 perintah izin.

Diputuskan, membenarkan permohonan dengan kos:

(1) Permohonan ini berbangkit kerana tafsiran berbeza yang diberikan oleh

plaintif-plaintif dan defendan-defendan atas terma-terma perenggan 11 perintah izin yang direkodkan oleh pihak-pihak. Mengambil kira tafsiran berbeza, terdapat keperluan untuk mahkamah menentukan apa yang patut menjadi tafsiran yang betul. Mahkamah perlu memutuskan sama ada tindakan baru patut dibenarkan atau tidak dalam mentafsirkan perenggan 11 tersebut. Dalam memutuskannya, adalah tanpa kesangsian bahawa keterangan yang membawa kepada perintah izin direkodkan perlu diambil kira. Adalah jelas keterangan peguam kedua-dua pihak yang merundingkan terma-terma perintah izin mesti di ambil kira. Terdapat kemungkinan besar bahawa peguam perlu memberi keterangan di mahkamah mengenai versi mereka mengapa terma sedemikian seperti dalam perenggan 11 perintah izin direkodkan di mahkamah (lihat perenggan 15–16).

(2) Kemungkinan besar peguam yang mewakili defendan-defendan dalam merekodkan perintah izin dengan perlu memberi keterangan berkaitan skop perenggan 11 perintah izin bermaksud bahawa peguam tersebut tidak patut dibenarkan untuk bertindak untuk defendan-defendan. Mereka adalah saksi-saksi berpotensi di mahkamah. Keterangan mereka atas sama ada plaintif-plaintif boleh memulakan tindakan mahkamah baru di bawah perenggan 11 perintah izin akan merupakan kepada percanggahan kepentingan terus untuk peguam kekal mewakili defendan-defendan. Peguam akan berada dalam kedudukan yang memalukan apabila ditanya di dalam mahkamah berkaitan tafsiran perenggan 11 perintah izin terutamanya kerana mereka telah terlibat secara menyeluruh dalam mendraf, berunding dan menyelesaikannya. Oleh itu En Choong dan firma tidak patut kekal sebagai peguam dan pihak yang bertindak sebagai wakil-wakil defendan-defendan di dalam mahkamah (lihat perenggan 17–19).]

Notes

For cases on professional conduct, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1488–1492.

Cases referred to

Dr Trilochan Kaur d/o Mohan Singh v The Malaysian Dental Council & Anor [2009] 4 MLJ 244, HC (folld)

Perak Hanjoong Simen Sdn Bhd v Perindustrian Tenaga Mix Sdn Bhd [2008] 8 MLJ 567, HC (folld)

Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 5 MLJ 705, HC (folld)

Jeremy Khalif Lee Phang Yau (Khalif Lee) for the plaintiffs.
RM Yeoh (Mohd Imtiaz Choong & Partners) for the defendants.

Abu Bakar Jais JC:

INTRODUCTION

[1] Enclosure 37 for the determination of the court is the application by the plaintiffs to recuse Messrs Mohd Imtiaz Choong & Partners ('the firm') and a partner of the firm, Mr Adrian Choong Khoong Beng ('Mr Choong'), from representing the second, third and fourth defendants in this suit. It is pertinent to note that the focus of this grounds of judgment is on this application alone.

MATERIAL FACTS

[2] This suit essentially is a derivative action filed by the plaintiffs against the defendants. It is only relevant to note that the present application is necesscitated because of the consent order recorderd by the parties in an earlier suit on minority oppression. The terms of the consent order is now disputed despite recorded in court.

[3] The second, third and fourth defendants herein were the first, second and third defendants in the consent order. For the sake of convenience here, the second, third and fourth defendants are collectively referred to as 'the defendants'.

[4] For the consent order, the defendants were represented by the firm. Mr Choong of the firm was the person who appeared together with one Mr Reza Rahim in the making of the consent order. Both negotiated, drafted, amended and finalised the terms and minutes of the consent order.

[5] Paragraph 10 of the consent order states:

> the 5th Defendant shall not make any payments or enter into any transactions and/or commitments without prior written approval of the Parties and/or the parties representatives as stipulated in Clause 10A who shall revert in writing within 7 working days.

[6] Paragraph 10A of the consent order stipulates:

> that *Parties agree to appoint* Messrs Wan Ewe Chong & Khoo as representatives and solicitors of the Plaintiff and *Messrs Imtiaz Choong & Partners as representatives and solicitors for the 1st to 4th Defendants and that communications amongst these solicitors shall be deemed communicated as between parties.* (Emphasis added.)

[7] Paragraph 11 of the consent order states:

> The Parties are at liberty and unconditionally and irrevocably authorised and empowered to commence any legal action on behalf of the Company based on the

A Report by the Forensic Auditor and/or findings of the Forensic Auditor within 3 months or receipt of the said Report, failing which the balance ourchase consideration shall be utilised to settle all existing creditors of the Company and the remainder thereof shall be distributed to the parties in accordance with their shareholding. For the avoidance of doubt, the Forensic Auditors report shall be
B furnished simultaneously to the solicitors of the parties mentioned herein and no instructions shall be issued and/or no meeting shall be conducted with the Forensic Auditor with the presence and/or consent of the parties or the solicitors.

[8] Paragarph 11 above is now disputed on the issue whether fresh court
C action can be initiated by the parties to the consent order. The plaintiffs say fresh action can be instituted but the defendants submit otherwise.

[9] To resolve that issue, the intentions of the parties in drafting and inserting para 11 into the consent order would have to be determined by the
D court. And this is where the dispute lies; whether Mr Choong acting under the name also of the firm, could still act as counsel for the defendants now since Mr Choong is most likely to be called as a witness to the hearing in determining the interpretation to cl 11 of the consent order.

E THE PLAINTIFFS' SUBMISSION

[10] In support of the application, the plaintiffs submit that paras 10 and 10A of the consent order as narrated mean that the firm and Mr Choong are to
F a large extent deeply involved in the mechanics of the consent order. Mr Choong's role as seen in that paragraphs mean that he is a potential witness in any dispute arising from the recording of the consent order.

[11] In respect of para 10A of the consent order, the plaintiffs contend that
G it was agreed between the parties that the communications between the appointed representatives of the parties are deemed communicated as between the parties. This means that the firm stand in the shoes of the defendants.

[12] The plaintiff say Mr Choong and the firm cannot be acting for the
H defendants any longer as it would be embarassing for him to testify in court and to be shown he is in conflict of interest in so testifying. Mr Choong would in any event be unable to cross-examine himself in that trial to determine the scope of para 11 of the consent order.

I THE DEFENDANTS' SUBMISSION

[13] In essense the defendants submit that Mr Choong and the firm are mere representatives of the company in the consent order. There can be no conflict

of interest and therefore both could still remain as counsel for the defendants. Both had acted for the same parties ie the defendants in the previous and current suits.

[14] The word 'representatives' in para 11 of the consent order must be taken in its proper prespective as it does not connote that both cannot be acting for the defendants any longer.

FINDINGS OF COURT

[15] There is no dispute that the plaintiffs present application arose because of the different interpretations given by the plaintiffs and defendants on the terms of para 11 of the consent order recorded by the parties. On one hand the plaintiffs maintain the position that para 11 of the consent order does not bar or hinder any fresh action to be filed. The defendants however is of the view that the plaintiffs cannot initiate fresh action by virtue of the consent order.

[16] In view of the different interpretations, there is a need for the court to determine what ought to be the correct interpretation of the relevant term as stated. The court will have to decide whether fresh action is allowed or not in interpreting the said para 11. In deciding the same, it is without doubt that evidence leading up to the recording of the consent order will have to be taken into account. The court will need to determine what were negotiated by the parties and how this term came about. Obviously the evidence of counsels of both parties that negotiated the terms of the consent order must be taken into account. In that sense there is a great likelihood that these counsels will need to testify in court as to their versions why such term as in cl 11 of the consent order was recorded in court.

[17] The great possibility of counsels representing the defendants in the recording of the consent order having to testify with regard to the scope of cl 11 of the consent order means that the said counsels should not be allowed to act for the defendants. They are potential witnesses in court. Their testimony on whether plaintiffs can institute fresh court action under para 11 of the consent order will amount to a direct conflict of interest for the counsels to remain representing the defendants.

[18] The counsels will be put in an embarrassing position when asked in court regarding the interpretation of para 11 of the consent order especially as they are already extensively involved in the drafting, negotiation and finalising of the same.

[19] Therefore Mr Choong and the firm should not remain as counsel and party that act as the defendants' representatives in court.

[20] I am guided by a few decided cases in allowing the application of the plaintiffs.

[21] In *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 it is stated:

> What would happen if Mr Gana Muthusamy is called upon to give evidence in the witness box? Surely he would be embarrassed as he could not cross-examine himself, nor can he address the court as to the credibility of his own testimony. As counsel for the plaintiff, Mr Gana Muthusamy would be seriously handicapped in representing his client's interests. That would not be fair to his client. In that situation, this court feels that justice will not be done if Mr Gana Muthusamy represents the plaintiff.
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> *In a case where a lawyer is required to testify, that lawyer should withdraw and entrust the conduct of the case to another lawyer.* It has been said that a lawyer who has given evidence should not appear as counsel on appeal. *A lawyer should not simultaneously serve as counsel and witness. To do so would put the lawyer's own credibility at stake and an issue.* These are generally Canadian principles that grew up over the years.
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> *To allow Mr Gana Muthusamy or his legal assistants to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of the clear words in s 94(3)(n) and (o) of the Legal Profession Act 1976.* As advocates and solicitors, they should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute. The law firm of Messrs Gana Muthusamy & Co, would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that Mr Gana Muthusamy owns that law firm. (Emphasis added.)

[22] The case *Perak Hanjoong Simen Sdn Bhd v Perindustrian Tenaga Mix Sdn Bhd* [2008] 8 MLJ 567 states:

> Rule 28(a)of the Practice and Etiquette Rules, *prohibits counsel to act* in a case *where he will be a potential witness* of material dispute *of facts*. The Rule consists of two limbs. Under the first limb, an advocate and solicitor should not appear in court or in chambers *for a case in which he has reason to believe that he will be a witness. Under the second limb he should also discharge himself if, while appearing it becomes apparent that he will be made a witness.* (Emphasis added.)

[23] The court in *Dr Trilochan Kaur d/o Mohan Singh v The Malaysian Dental Council & Anor* [2009] 4 MLJ 244 held that:

> *In principle, the position of Mr Rajasingam is akin to someone who is a witness or likely to be made a witness or party, in a proceedings. Such a person cannot act as counsel in the very same proceedings for obvious reasons. It will be very difficult to maintain the required professional independence to act in the best interest of the administration of justice. In principle too, I should think any other person from the same firm of solicitors will be unable to maintain the very same required degree of professional independence and avoid embarrassment. The approach adopted by Abdul Malik Ishak J (as he then was) in the Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 *is an appropriate one*. The issue in this High Court case relates to

whether a law firm shall remain on record as solicitors when one of its lawyers is required as witness. Abdul Malik J, after an exhaustive reference to several jurisdictions, had this to say on the matter:

> To allow (counsel) or his legal assistance to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of the clear words in s 94(3)(n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to the client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute. The law firm ... would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that (counsel) owes that law firm. (This last observation, I must add, is peculiar to the facts of that case, but does not detract from the general principles).

The principles established by Abdul Malik Ishak J (as he then was) should be followed, and I do so here. (Emphasis added.)

CONCLUSION

[24] Based on all the reasons explained the application of the plaintiffs is allowed with costs.

Application allowed with costs.

Reported by Afiq Mohamad Noor